

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

NOV 26 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Appellant,

v.

MICHAEL WESLEY BARBER,

Appellee.

2 CA-CR 2008-0017

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of  
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20070470

Honorable Robert Duber, II, Judge

VACATED

Daisy Flores, Gila County Attorney  
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Tucson  
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V Á S Q U E Z, Judge.

¶1 The State of Arizona appeals from the trial court’s dismissal of charges against appellee Michael Barber, arguing the court erred in finding Barber incompetent to stand trial on the basis of a competency evaluation conducted by only one mental health professional. For the reasons discussed below, we vacate the trial court’s order granting Barber’s motion to dismiss.

### **Facts and Procedural Background**

¶2 In May 2007, Barber was indicted on one count of unlawful flight from a pursuing law enforcement vehicle, one count of resisting arrest, and two counts of aggravated assault. On November 19, the trial court held a hearing on Barber’s motion for a competency evaluation pursuant to Rule 11, Ariz. R. Crim. P. Barber requested an evaluation be conducted by a psychologist, Dr. Marc Walter. Because Barber was indigent, he also requested the court pay for the evaluation. The state did not oppose a competency evaluation but objected to the appointment of Walter. The court overruled the state’s objection, stating: “Each of you can have separate experts, if you wish, you can retain one. I am not going to require that [Barber] select an acceptable one by the state.”

¶3 The court agreed to provide \$750 for Barber to obtain an evaluation. However, based on its prior experience with Walter, the court expressed concern that this sum might not be sufficient to cover his fees and that it might have to appoint an alternative expert. It therefore set a hearing for December 19, which it indicated would be “a review

. . . just to confirm that in fact . . . [an] appointment has been made so we don't let the matter slip.”<sup>1</sup>

¶4 By the time of the second hearing, however, Walter had already completed a psychological evaluation of Barber. At that December hearing, the state moved for the appointment of a second expert, a psychiatrist, pursuant to Rule 11.3. However, the trial court commented that the state could not “stand by and see how the result comes out and if you don't like the result, ask for a different opinion.” The court found that, by failing to “ma[k]e a request for anyone for the State to do an evaluation,” the state had “waived its claim . . . to have a second evaluation.” Thus, relying solely on Walter's evaluation, the court found Barber was incompetent to stand trial and could not be restored to competence. It therefore granted Barber's oral motion to dismiss all the charges without prejudice. This appeal followed.

### **Discussion**

¶5 The state argues the trial court erred in granting Barber's motion. A court has “discretion to dismiss charges against a defendant found to be incompetent at any time.” *State v. McPherson*, 158 Ariz. 502, 504, 763 P.2d 998, 1000 (App. 1988). We will not reverse “unless we find an abuse of that discretion, that is, ‘discretion manifestly

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<sup>1</sup>The court's minute entry similarly stated: “At this hearing the Court will confirm that someone has been selected to conduct the evaluation.”

unreasonable, or exercised on untenable grounds, or for untenable reasons.”” *Id.*, quoting *Quigley v. City Court*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982).

¶6 If reasonable grounds exist for a competency evaluation, A.R.S. § 13-4505(A) requires the court to “appoint two or more mental health experts . . . to examine the defendant, issue a report and, if necessary, testify regarding the defendant’s competency.” *See* Rule 11.3(a). However, the statute also provides that “[t]he state and the defendant may stipulate to the appointment of only one expert.” § 13-4505(A); *see* Rule 11.3(c). The state contends the trial court abused its discretion by “mak[ing] orders contrary to the provisions of the applicable statute and Rule.” Specifically, the state argues the court erred in finding the state had waived the appointment of two mental health experts to assess Barber’s competency pursuant to § 13-4505(A) and Rule 11.3 and thus abused its discretion in finding Barber incompetent to stand trial based on a report from a single expert.<sup>2</sup>

¶7 Here, given the trial court’s lack of notice to the parties that it would make a competency determination at the December hearing, the record does not support the court’s finding that the state had waived its right to have a second expert appointed.<sup>3</sup> It is

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<sup>2</sup>Because we reverse on this ground, we do not address the state’s related arguments that Rule 11.3 does not contemplate parties’ stipulating to a single expert who is not a psychiatrist and that “the equivocating nature of the . . . conclusions” of Walter’s evaluation did not support the court’s finding of incompetence.

<sup>3</sup>In an order issued two days before the December hearing confirming receipt of the psychological evaluation report prepared by Walter, the court referred to the hearing only as a “Status Hearing” and gave no indication that its purpose had changed. Although Rule 11.5(a), Ariz. R. Crim. P., does not explicitly require prior notice of a competency

unclear whether the court’s comment at the November hearing, that the state could “have [a] separate expert[],” was intended to inform the state that it could retain its own expert pursuant to § 13-4505(D) or to offer it the opportunity to submit a list of experts from which the court could choose pursuant to Rule 11.3(c).<sup>4</sup> However, there is no record of a stipulation to the appointment of one expert; on the contrary, the record clearly shows the state’s objection to Walter, the lone expert on whose evaluation the court ultimately relied. And the court gave no indication in November that, if the state failed to choose an expert by the next hearing, it would not merely waive its right to retain its own expert or to have the court select an expert from its list but also would be constructively stipulating to the appointment of only one expert. *See State v. Schackart*, 175 Ariz. 494, 500, 858 P.2d 639, 645 (1993).

¶8 The requirement that at least two experts conduct a competency evaluation is intended to reduce the “uncertainty as to [a] defendant’s actual condition,” *see State v. McClendon*, 101 Ariz. 285, 290, 419 P.2d 69, 74 (1966), and we have been unwilling to find it waived under circumstances falling short of the stipulation required by § 13-4505(A) and Rule 11.3(c), *see State v. Hansen*, 146 Ariz. 226, 232, 705 P.2d 466, 472 (App. 1985)

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determination, the absence of any such notice appears inconsistent with that rule’s provision permitting the parties to “introduce other evidence regarding the defendant’s mental condition” at a competency hearing.

<sup>4</sup>Section 13-4505(D) provides that any party may “retain[] its own expert to conduct any additional examinations at its own expense”; Rule 11.3(c) requires the court to appoint two or more experts from a list of names supplied in the Rule 11 motion and in the nonmoving party’s response.

(lack of objection to court's error in appointing only one expert did not waive issue on appeal). We therefore agree with the state that the trial court abused its discretion in finding the state had waived its claim to have a second evaluation, in treating this putative waiver as tantamount to a stipulation, and thus in making a determination of incompetency and dismissing the charges against Barber based on only one expert's evaluation.

### **Disposition**

¶9 For the reasons stated above, we vacate the trial court's competency determination and its order granting Barber's motion and dismissing the charges, and we remand for further proceedings consistent with this decision.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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JOSEPH W. HOWARD, Judge